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No. 06-40

IN THE

Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF BOY SCOUTS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Boy Scouts of America ("Boy Scouts") hereby respectfully moves, pursuant to Rule 37.2 of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari. Petitioner has consented to the filing of this brief in a Consent to File *Amicus Curiae* Briefs filed with this Court on July 24, 2006. Respondent, however, would not consent without first being able to approve the content of Boy Scouts' brief.

As more fully explained in the attached brief, after this Court recognized that the First Amendment protects Boy Scouts' expressive leadership policies from governmental interference, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), Boy Scouts has been subjected to repeated attacks by government entities and others who disapprove of Boy Scouts' expression, *e.g.*, *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); *Winkler v. Chicago School Reform Board of Trustees*, No. 99C2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005), 382 F. Supp. 2d 1040 (N.D. Ill. 2005), *argued sub nom. Winkler v. Rumsfeld*, No. 05-3451 (7th Cir. Apr. 6, 2006); *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), *argued*, Nos. 04-55732, 04-56167 (9th Cir. Feb. 14, 2006); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001).

Boy Scouts is the organization most directly affected by the California Supreme Court's decision at issue in this case and, therefore, has a vital interest in this Court's

consideration of the petition. Boy Scouts also is uniquely capable of assisting the Court in understanding the danger to the freedoms of speech and association posed by the decision below and the other cases pending in the lower courts.

For the reasons stated above, Boy Scouts respectfully requests that this Court grant this motion for leave to file the attached *amicus curiae* brief.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

REASONS FOR GRANTING THE PETITION 5

I. THIS CASE PRESENTS A RECURRING FIRST AMENDMENT ISSUE OF NATIONAL IMPORTANCE 7

II. THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS FROM THIS COURT AND THE COURTS OF APPEALS 11

III. THE CALIFORNIA SUPREME COURT'S DECISION IS INCONSISTENT WITH THIS COURT'S DECISIONS REJECTING UNCONSTITUTIONAL CONDITIONS 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Barnes-Wallace v. Boy Scouts of America, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), *argued*, Nos. 04-55732, 04-56167 (9th Cir. Feb. 14, 2006) 2, 7, 8

Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996) 6, 14, 15

Bowman v. White, 444 F.3d 967 (8th Cir. 2006) 12

Boy Scouts of America v. Dale, 530 U.S. 640 (2000) ..... *passim*

Boy Scouts of America v. Till, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) 2, 8-9

Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004) 2, 8, 9

Brown v. California Department of Transportation, 321 F.3d 1217 (9th Cir. 2003) 12

Catholic Charities of the Diocese of Albany v. Serio, 808 N.Y.S.2d 447, 28 A.D.3d 115 (N.Y. App. Div. 2006) 10

Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal.), *cert. denied*, 543 U.S. 816 (2004) 10

Christian Legal Society v. Walker, 453 F.3d 853 (7th Cir. 2006) 6, 9, 11-12

Christian Legal Society Chapter of University of California, Hastings College of the Law v. Kane,

No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006), *appeal docketed*, No. 06-15956 (9th Cir. May 23, 2006) 6, 9-10

Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001) 12-13

Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218 (Cal. 1998) 2, 4

Evans v. City of Berkeley, 38 Cal. 4th 1, 129 P.3d 394 (Cal.), *petition for cert. filed*, No. 06-40 (July 7, 2006) ..... *passim*

Every Nation Campus Ministries at San Diego State University v. Reed, No. 05-CV-2186 LAB (S.D. Cal. filed Nov. 28, 2005) 10

FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 15, 16

Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997) 13

Good News Club v. Milford Central School, 533 U.S. 98 (2001) 11

Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 578 F.2d 1122 (5th Cir. 1978) 13

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) 11

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 15, 16

Perry v. Sindermann, 408 U.S. 593 (1972) 15

Randall v. Orange County Council, Boy Scouts of America, 952 P.2d 261 (Cal. 1998) 2

Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005) 13

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995) ..... *passim*

Rust v. Sullivan, 500 U.S. 173 (1991) 15

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) ..... *passim*

Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002) 12

Speiser v. Randall, 357 U.S. 513 (1958) 7, 14-15

Thomas v. Review Board, 450 U.S. 707 (1981) 15

Truth v. Kent School District, No. 03-cv-00785 MJP (W.D. Wa. Sept. 22, 2004), *argued*, No. 04-35876 (9th Cir. July 27, 2006) 10

Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993) 2

Winkler v. Chicago School Reform Board of Trustees, No. 99C2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005), 382 F. Supp. 2d 1040 (N.D. Ill. 2005), *argued sub nom. Winkler v. Rumsfeld*, No. 05-3451 (7th Cir. Apr. 6, 2006) 2, 7-8

PUBLICATIONS

Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994) 9

Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, Weekly Standard (May 15, 2006) 10

Tina Moore, *City Poised to Evict Boy Scouts Council*, Philadelphia Inquirer, July 23, 2006 8

Erez Reuveni, Note, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. Rev. 109 (2006) 2

Boy Scouts of America ("Boy Scouts"), as *amicus curiae*, supports granting the petition for a writ of certiorari and reversal of the judgment of the California Supreme Court entered in this case. 38 Cal. 4th 1, 129 P.3d 394 (2006).[1]

INTEREST OF THE *AMICUS CURIAE*

Boy Scouts of America is "a private, not-for-profit organization engaged in instilling its system of values in young people." *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000). More than three million youth members and one million adult leaders are active in the traditional programs of Cub Scouting, Boy Scouting, and Venturing. Venturing is a coeducational program for young adults between the ages of 14 and 21. Sea Scouting is a program within Venturing that promotes better citizenship through learning boating skills and America's maritime heritage.

All Boy Scouts and their adult leaders agree to follow the Scout Oath and Law,[2] which embody traditional values. *See Dale*, 530 U.S. at 649. The Scout Oath includes the obligations to do one's "duty to God" and to be "morally

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[1] Counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] The Scout Oath states that "On my honor I will do my best / To do my duty to God and my country / and to obey the Scout Law; / To help other people at all times; / To keep myself physically strong, / mentally awake, and morally straight." *Dale*, 530 U.S. at 649. The Scout Law provides that a Scout is "Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent." *Id.*

straight." *Id.* In adhering to these values, Boy Scouts does not accept as members atheists or agnostics, *see Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1268 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); *Randall v. Orange County Council, Boy Scouts of America*, 952 P.2d 261, 264-65 (Cal. 1998), or avowed homosexuals, *see Dale*, 530 U.S. at 653-54; *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 224-25 (Cal. 1998).

Since this Court confirmed Boy Scouts' First Amendment rights six years ago, Boy Scouts has been defending itself against attacks by government entities and individuals who disapprove of Boy Scouts' expression. *E.g.*, *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001). Two appeals are currently pending in the courts of appeals. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), *argued*, Nos. 04-55732, 04-56167 (9th Cir. Feb. 14, 2006); *Winkler v. Chicago School Reform Board of Trustees*, No. 99C2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005), 382 F. Supp. 2d 1040 (N.D. Ill. 2005), *argued sub nom. Winkler v. Rumsfeld*, No. 05-3451 (7th Cir. Apr. 6, 2006). *See generally* Erez Reuveni, Note, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. Rev. 109, 114-20 (2006).

The instant case concerns a decision of the California Supreme Court to affirm dismissal of a complaint filed by members of Boy Scouts active in Sea Scouting in Berkeley, California, despite a public record replete with evidence of viewpoint discrimination against the Scouts. The Berkeley

Sea Scouts are a group of citizens teaching youth Scouting values through sailing activities in the Berkeley marina. (App. A-2, D-4-D-5.)[3] Until recently, the Berkeley Sea Scouts had used berth space free of charge in the City marina without incident for more than 60 years. (App. A-3, D-8-D-11.)

The City of Berkeley adopted a resolution in March 1997 granting free berth space in the City's marina to nonprofit groups that "supply a beneficial public service" and demonstrate that the benefit of their activities "greatly exceeds the value of the berth." (App. A-4.) The resolution provides that the organizations "demonstrate . . . that they promote cultural and ethnic diversity." (App. A-4.) The resolution further states that

> The Berkeley Marina advocates and practices equal opportunity in terms of access to its berthing facilities. Availability and use of the facilities will not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition.

(Resolution No. 58,859 N.S.; *see* App. A-4.)

Under this policy, the City granted free berthing to the Berkeley Sea Scouts, the Berkeley Yacht Club, the Cal Sailing Club, the Nautilus Institute, and the Bay Area Association of Disabled Sailors. (App. D-21; Res. Nos. 59,986-N.S. (1999), 60,747-N.S. (2000), 61,774-N.S.

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3. Numbers preceded by "App." refer to pages in the appendix bound with the petition for a writ of certiorari.

(2002).) The Cal Sailing Club's Women's Sailing Clinic is a "special 'women teaching women'" program that limits access based on "sex."[4] The Nautilus Institute operates a program for "teenage public school students" that predicates access on "age."[5] And there can be little dispute that the Bay Area Association of Disabled Sailors focuses its services on those with a "disability or medical condition." The City has never questioned the propriety of the berthing space for these groups.[6]

Following the California Supreme Court's 1998 decision in *Curran*, a case factually similar to *Dale* resolved under state law, the City punished the Berkeley Sea Scouts for affiliation with Boy Scouts by revoking their free use of berth space in the City marina. (App. A-7, D-25.) The City Council recognized that the Berkeley Sea Scouts program made "enormous contributions to the community." (App. D-24.) Nevertheless, the City Council excluded the Berkeley Sea Scouts from participating in the berthing program "due to" Boy Scouts' policies. (App. A-6.) For Boy Scouts, speech is no longer free in Berkeley.

City officials targeted the Berkeley Sea Scouts on the theory that the Berkeley Sea Scouts violated a City ordinance (distinct from the resolution) prohibiting the City from discriminating against persons seeking access to the City

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[4] *See* http://cal-sailing.org/bottle/2002/Aug.html (last visited Sept. 8, 2006).

[5] *See* http://nautilus.org/archives/pegasus/ (last visited Sept. 8, 2006).

[6] The Berkeley Sea Scouts were unable to fully explore this evidence because their complaint was dismissed before discovery.

marina and other City facilities and services (App. D-11-D-20). In a peculiar reading of the law, the City determined that the ordinance required it to discriminate against the Berkeley Sea Scouts and exclude them from the program. (App. D-21-D-25.)

Certain City Councilmembers "made clear" that they wanted to take 'punitive actions' against the Sea Scouts in an 'attempt to overturn [Boy Scouts'] national policies.'" (App. A-24 n.10; *see* App. D-19.) The Chair of Berkeley's Waterfront Commission and other City Councilmembers stated that the City was excluding the Berkeley Sea Scouts "in order to retaliate against the national Boy Scouts of America organization for having declined Timothy Curran's application to become a Scoutmaster." (App. D-24; *see* App. A-24 n.10.) Another Councilmember went so far as to state that, in order to keep the free berth space, the Berkeley Sea Scouts should change Boy Scouts' policy to make it "explicit that they are willing to recruit homosexuals and atheists."[7]

The City informed the Berkeley Sea Scouts by letter dated May 21, 1998, that they had been excluded from the berthing program because they "were associated with the national Boy Scouts of America." (App. D-25.)

REASONS FOR GRANTING THE PETITION

This case presents a First Amendment issue of national importance: May a government exclude an otherwise eligible organization from participating in a

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[7] Video tape: City of Berkeley City Council Meeting (May 5, 1998) (on file with author).

generally available government forum or program because of the organization's expression?

The California Supreme Court's decision infringes First Amendment principles of free speech and association. The decision is part of a growing pattern of government actions and lower court decisions that have excluded the Boy Scouts and traditional religious groups from government facilities and programs open to a variety of groups because of their views and related membership requirements with respect to religious belief, morality, and sexual conduct.

Furthermore, the California court's decision is in direct conflict with this Court's precedents, *see, e.g.*, *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831-32 (1995), and is one of a number of lower court cases reaching inconsistent results. *Compare Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006) (preliminarily enjoining Southern Illinois University School of Law from excluding the Christian Legal Society from the ranks of recognized student groups), *with Christian Legal Society Chapter of University of California, Hastings College of the Law v. Kane*, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006) (upholding the decision of Hastings College of Law to exclude Christian Legal Society from the ranks of recognized student groups), *appeal docketed*, No. 06-15956 (9th Cir. May 23, 2006).

Finally, the California court's decision is inconsistent with this Court's decisions holding that government may not condition an otherwise-available benefit on abandonment of First Amendment rights. *See, e.g., Board of County Commissioners v. Umbehr*, 518 U.S. 668, 674 (1996); *Rutan*

v. Republican Party of Illinois, 497 U.S. 62, 77-78 (1990); *Speiser v. Randall*, 357 U.S. 513 (1958).

I.
THIS CASE PRESENTS A RECURRING FIRST AMENDMENT ISSUE OF NATIONAL IMPORTANCE

Under the California Supreme Court's decision, state and local governments are free to punish the Boy Scouts for its views. The decision puts at risk the First Amendment rights of all expressive associations – especially religious groups – to adhere to their moral convictions without being "select[ed] for disfavored treatment" at the hands of government. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831 (1995).

The California court's decision is one of several pending matters involving the Scouts.

1. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1263 (S.D. Cal. 2003), *argued*, Nos. 04-55732, 04-56167 (9th Cir. Feb. 14, 2006). Boy Scouts developed on City parkland and operated at no cost to the City of San Diego a campground and an aquatic center open to all San Diego youth groups. Notwithstanding that the City has similar nominal-rent leases of City land with over 100 nonprofits – including churches – the district court revoked Boy Scouts' leases under the Establishment Clause. Boy Scouts' appeal to the Ninth Circuit is awaiting decision.

2. *Winkler v. Chicago School Reform Board of Trustees*, No. 99C2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005), 382 F. Supp. 2d 1040 (N.D. Ill. 2005), *argued sub nom. Winkler v. Rumsfeld*, No. 05-3451 (7th Cir. Apr. 6, 2006). The district court held that the Department of

Defense violated the Establishment Clause by supporting the National Scout Jamboree, an event held every four years at Fort A.P. Hill in Fredericksburg, Virginia. The Jamboree is a national, civic, patriotic event attended by Presidents and other government officials. The military views the Jamboree as a unique training opportunity to assist in the erection, support, and dismantling of a temporary "tent city" of 40,000 Scouts and their adult leaders for a ten day period. The district court concluded, based on the district court's decision in *Barnes-Wallace*, that Boy Scouts' "duty to God" requirement rendered Boy Scouts a religious organization and invalidated the support under the Establishment Clause.

3. *City of Philadelphia.* In Philadelphia, over 75 community organizations have $1-a-year leases from the City, including Boy Scouts and several religious groups. The City recently threatened Boy Scouts with eviction because of its constitutionally-protected membership requirements. The City gave Scouts an ultimatum of changing its internal membership policies, paying market rent, or vacating the building that Boy Scouts constructed in 1930 on City property. *See* Tina Moore, *City Poised to Evict Boy Scouts Council*, Philadelphia Inquirer, July 23, 2006.[8]

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8. Two cases that have concluded are in conflict. In *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004), the State of Connecticut excluded Boy Scouts from a charitable campaign in which 900 groups of all different kinds participate solely because of Boy Scouts' constitutionally-protected views and leadership policies. Boy Scout councils had participated in the campaign for 30 years. The Second Circuit recognized that the Boy Scouts' policies were "constitutionally protected" but nonetheless upheld the notion that Boy Scouts should "pay[] a price" for "exercising its First Amendment rights." *Id.* at 95 n.8. In *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001),

The significance of the California Supreme Court's decision extends far beyond its impact on the Boy Scouts. Government officials of all kinds – state officers, public university officials, school boards – are excluding religious and other groups from access to programs on account of their religious or moral values and their efforts to maintain their distinctive identities. *See* Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369-70 (1994).

1. *Christian Legal Society.* A divided panel of the Seventh Circuit preliminarily enjoined Southern Illinois University School of Law from revoking the Christian Legal Society's status as a recognized student organization because of its views on sexual morality and attendant membership requirements. *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In contrast, a district court in California recently applied the California Supreme Court's decision in *Evans*, on petition here, and *Wyman*, to deny recognition to the Christian Legal Society chapter at Hastings Law School. *Christian Legal Society Chapter of University of California, Hastings College of the Law v. Kane*, No. C 04-04484 JSW,

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Boy Scout groups in Broward County had been permitted to make use of public school facilities after-hours for many years. But, after *Dale*, "the School Board . . . concluded that *the Scouts are ineligible to rent and lease school facilities like any other private group* because the Scouts' membership policies" violated the School Board's anti-discrimination policy. *Id.* at 1297 (emphasis added). The district court entered a preliminary injunction against the school board. The injunction was later converted to a permanent injunction on consent.

2006 WL 997217 (N.D. Cal. Apr. 17, 2006), *appeal docketed*, No. 06-15956 (9th Cir. May 23, 2006).

2. *Other On-Campus Christian Groups*. The Ninth Circuit recently heard oral argument in *Truth v. Kent School District*, No. 03-cv-00785 MJP (W.D. Wa. Sept. 22, 2004), *argued*, No. 04-35876 (9th Cir. July 27, 2006), in which the district court upheld the right of a public high school to deny recognition to an on-campus Christian club whose membership was limited to Christians. A similar case is pending in the Southern District of California. *Every Nation Campus Ministries at San Diego State University v. Reed*, No. 05-CV-2186 LAB (S.D. Cal. filed Nov. 28, 2005). Several on-campus Christian student groups sued the California State University system after they were denied recognition because their internal membership policies require members to adhere to a Christian statement of faith and code of conduct.

3. *Catholic Charities*. Two states have concluded that Catholic Charities is insufficiently religious to avoid having to include birth control coverage in its health care plan for employees. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal.), *cert. denied*, 543 U.S. 816 (2004); *Catholic Charities of the Diocese of Albany v. Serio*, 808 N.Y.S.2d 447, 28 A.D.3d 115 (N.Y. App. Div. 2006). Similarly, Catholic Charities of Boston recently was pressured to cease doing adoptions rather than change policies to permit adoptions to same-sex couples in violation of Catholic doctrine. *See* Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, Weekly Standard (May 15, 2006).

Too many government officials do not respect the First Amendment rights of dissenting groups as explicated by the Court's decisions in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), *Rosenberger*, and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The California Supreme Court's decision in this case, absent this Court's review, would empower government officials to retaliate against groups whose views and internal membership practices they find objectionable.

II.
THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS FROM THIS COURT AND THE COURTS OF APPEALS

The California Supreme Court's decision conflicts with this Court's decisions forbidding denial of benefits on the basis of viewpoint. *E.g.*, *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831-32 (1995) (viewpoint discrimination to "select[] for disfavored treatment" a student religious publication by excluding it on the basis of its religious character from a forum available to publications); *see Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (viewpoint discrimination to exclude club "based on its religious nature" from use of school facilities); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993) (viewpoint discrimination to ban religious group from use of school facilities to show film having a religious perspective).

The California court's decision also conflicts directly with decisions of the courts of appeals. Most recently, in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), the Seventh Circuit ordered a preliminary injunction

to prevent Southern Illinois University School of Law from excluding the Christian Legal Society from among the ranks of recognized student groups. The law school dean had revoked CLS's registered student organization status, stating that the "tenets of the national CLS" violated university anti-discrimination policies. *Id.* at 858. Following *Rosenberger*, the Seventh Circuit recognized that such viewpoint-based exclusion violated the First Amendment and enjoined the exclusion until the district could rule on the merits. *See id.* at 865-67.

Other circuits have also recognized that speakers and expressive associations may not constitutionally be excluded from government programs for no other reason than government disagreement with their viewpoints: *Bowman v. White*, 444 F.3d 967, 973, 983 (8th Cir. 2006) (state university common areas are a designated public forum, so street preacher who used "inflammatory" and "offensive" language was permitted to speak under content neutral policies); *Brown v. California Department of Transportation,* 321 F.3d 1217, 1221-25 (9th Cir. 2003) (highway overpass fences are a nonpublic forum so state's policy of allowing American flags but banning "unpatriotic" messages on fences was neither reasonable nor viewpoint neutral); *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (state's special license plate program facilitated private, rather than government, speech, as to which viewpoint discrimination was impermissible); *Cuffley v. Mickes*, 208 F.3d 702, 712 (8th Cir. 2000) (Ku Klux Klan may participate in state adopt-a-highway program despite federal and state anti-discrimination law because "viewpoint-

based exclusion of a[n] individual or organization from a government program is not a constitutionally permitted means of expressing disapproval of ideas ... that the government disfavors"), *cert. denied*, 532 U.S. 903 (2001);[9] *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1548-50 (11th Cir. 1997) (state law prohibiting any state college or university from spending funds to sanction, recognize, or support any group that promotes homosexuality was viewpoint discriminatory when groups with other viewpoints were allowed to be funded).

Here, the California Supreme Court recognized that "there is no dispute" that the basis for the City's exclusion of the Berkeley Sea Scouts from the nonprofit berthing program was Boy Scouts' leadership policies. (App. A-25; *see* App. A-6-A-8.) By allowing the City to condition access to a government program on the relinquishing of constitutional rights of speech and association, the California court significantly departed from this Court's First Amendment precedents and created a conflict with other circuits. The guidance of this Court is necessary to ensure that the government is not allowed to so easily circumvent the protections provided by the First Amendment.

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9. *See also Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978). Indeed, the Fifth and Eighth Circuits have granted the Ku Klux Klan greater First Amendment protection than the California Supreme Court has permitted Boy Scouts.

III.
THE CALIFORNIA SUPREME COURT'S DECISION IS INCONSISTENT WITH THIS COURT'S DECISIONS REJECTING UNCONSTITUTIONAL CONDITIONS

It is undisputed that the City of Berkeley has conditioned the participation of the Berkeley Sea Scouts in the berthing program on their agreement to refrain from exercising constitutionally-protected rights. By sanctioning a scheme under which the City did not directly compel a private organization to relinquish its constitutional rights but rather penalized the group for exercising these rights, the California court allowed the City to impose an unconstitutional condition on the Berkeley Sea Scouts' participation in the marina program.

This Court has left no doubt "that constitutional violations may arise from the deterrent, or chilling, effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights." *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 674 (1996) (internal citation omitted). Put another way, this Court has held that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990).

The unconstitutional conditions doctrine has been consistently applied in the decisions of this Court stretching back five decades to *Speiser v. Randall*, 357 U.S. 513 (1958), where, in invalidating California's attempt to condition receipt of a tax exemption on the taking a loyalty oath, the Court held that to

> deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

Id. at 518.

Since that time, this Court has repeatedly held that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Board*, 450 U.S. 707, 716 (1981); *see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542, 548 (2001) (conditioning grants to lawyers for indigent persons on their refusal to challenge validity of welfare laws was unconstitutional); *Umbehr*, 518 U.S. at 674 (county board's decision not to renew trash hauling contract because of hauler's criticism of board was unconstitutional); *Rutan*, 497 U.S. at 77-78 (basing personnel decisions on party affiliation was unconstitutional); *FCC v. League of Women Voters of California*, 468 U.S. 364, 402 (1984) (conditioning grants to public broadcasters on their agreement to refrain from editorializing was impermissible); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

In the face of these precedents, the California court misapplied *Rust v. Sullivan*, 500 U.S. 173 (1991), to conclude that the conditioning of participation on the relinquishment of First Amendment rights was permissible because the City's berthing program is, in practical effect, a subsidy. This Court has not hesitated to strike down

conditions, even conditions on the receipt of monetary aid, that were unrelated to the central purpose of the government program and "programmatic message." *Legal Services Corp.*, 531 U.S. at 542, 548 (government could not condition grants to lawyers serving indigent clients on their agreement to refrain from challenging the constitutionality of welfare laws since the grant program was not designed "to promote a government message"); *see Rosenberger*, 515 U.S. at 831-32 (refusal to fund student publication with religious viewpoint was unconstitutional where purpose of funding was not to promote a government message but rather to encourage a variety of viewpoints); *League of Women Voters*, 468 U.S. at 402 (ban on editorializing by public radio networks was unconstitutional since it was unnecessary in light of purposes of government funding program). If the government were permitted to recast a condition on funding as a mere definition of its program, "the First Amendment [would] be reduced to a simple semantic exercise." *Legal Services Corp.*, 531 U.S. at 547.

The City of Berkeley has imposed a condition intended to "press" the Berkeley Sea Scouts "to conform their beliefs and associations to some state-selected orthodoxy." *Rutan*, 497 U.S. at 75. By sanctioning the City's conduct, the decision below runs afoul of this Court's decisions prohibiting the government from attempting to indirectly coerce private organizations into relinquishing their constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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